Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

ANGELA EASTERLING as Personal Representative
of the Wrongful Death Beneficiaries of
Wadreanna Quadashea Magee,
Petitioner,

v.

UNIVERSITY OF MISSISSIPPI MEDICAL CENTER,
Respondent.

On Petition for a Writ of Certiorari to the Mississippi Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Mississippi Supreme Court's order dismissing Petitioner's action was an unconstitutional deprivation of her fundamental rights.

2. Whether *Chevron* factors require prospective-only application of new, unprecedented procedural rules, when retroactive application deprives Petitioner of due process and fundamental human rights.

3. Whether the Mississippi Supreme Court's failure to apply the *Chevron* factors violated Petitioner's fundamental rights.

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Plaintiff-Appellant: Angela Easterling as Personal Representative of the Wrongful Death Beneficiaries of Wadreanna Quadashea Magee.

Defendant-Appellee: University of Mississippi Medical Center.

RULE 29.6 STATEMENT

Petitioner has no parent corporation, and no publicly held company owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Angela Easterling, respectfully petitions for a writ of certiorari to review the judgment of the Mississippi Supreme Court in this case.

OPINIONS BELOW

The unreported denial of Petitioner's Motion for Rehearing is reproduced in Appendix A. The state court's dismissal is reported at *Univ. of Miss. Med. Ctr. v. Angela Easterling, et al.*, 928 So.2d 815 (Miss. 2006), attached as Appendix B.

The judgment of the Mississippi Supreme Court was entered on April 6, 2006. Motion for Rehearing was denied on June 1, 2006.

JURISDICTION

This Court has jurisdiction to hear appeals from the highest court of a State when a citizen is denied any right or privilege granted by the constitution on the grounds that the deprivation is repugnant to the Constitution or laws of the United States. 28 U.S.C. § 1257(a). Petitioner asserts her fundamental rights which are afforded her under the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States.

Jurisdiction for this Court is found in a split in the circuits on the issue of retroactivity in civil matters. *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); *Am. Trucking Ass'n, Inc. v. Ark. Highway Trans. Dep't.*, 496 U.S. 167 (1990); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991); *Harper v. Va. Dep't. Of Taxation*, 509 U.S. 86 (1993); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 751-755 (1995); *Glazner v. Glazner*, 347 F.3d 1212 (11th Cir. 2003); *Crowe v. Bolduc*,

365 F.3d 86 (1st Cir. 2004); *Jazz Photo Corp. v. Dreier LLP*, No. 05-5198, 2006 U.S. Dist. Lexis 14559 (D.N.J. March 15, 2006).

This Court has jurisdiction when a federal question exists. *Am. Trucking Ass'n, Inc. v. Ark. Highway Trans. Dep't.*, 496 U.S. 167, 177-178 (1990).

This Court has jurisdiction to enforce a federally created right recognized under Mississippi law. *Burrell v. Miss. State Tax Comm'n*, 536 So.2d 848, 863 (Miss. 1998).

There is no doctrine which requires federal court abstention "merely because resolution of a federal question may result in the overturning of a state policy." *Zablocki, Milwaukee County Clerk v. Redhail*, 434 U.S. 374, 380 (1978).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal does not challenge the constitutionality of any statute. This appeal involves judicial interpretation of:

> Miss. Code Ann. § 11-46-11(1): "After all procedures within a governmental entity have been exhausted, any person having a claim for injury arising under the provisions of this chapter against a governmental entity . . . shall proceed as he might in any action at law or in equity; provided, however, that ninety (90) days prior to maintaining an action thereon, such person shall file a notice of claim with the chief executive officer of the governmental entity."
>
> The Fourteenth Amendment to the United States Constitution: "No State shall make or enforce any

law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fifth Amendment to the United States Constitution: " . . .[N]or be deprived of life, liberty, or property, without due process of law; . . .".

The Fourth Amendment to the United States Constitution: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause. . ." .

STATEMENT

Petitioner is appealing the dismissal of her cause of action by the Mississippi Supreme Court in *Univ. of Miss. Med. Ctr. v. Angela Easterling, et al.*, 928 So.2d 815 (Miss. 2006). Petitioner's lawsuit was dealt a deathblow when the Mississippi Supreme Court dismissed her action making widespread changes to the existing judicial interpretation of Miss. Code Ann. § 11-46-11 with a retroactive application. Petitioner has lost substantive fundamental rights afforded her under the Constitution as a result of the state court's change of an unbroken eight year precedent regarding the substantial compliance standard as applied to the notice provision of Miss. Code Ann. § 11-46-11(1). Additionally, the state overturned years of unbroken precedent requiring the state to request a stay in the action for inadequate or untimely notice or find the issue to be waived. *Leflore County v. Givens*, 754 So.2d 1223, 1232 (Miss. 2000). Further, the court failed to

follow its recent precedent which required the state to plead, file a motion in eight months or less and have a hearing on an affirmative defense or deem it waived. *Miss. Credit Ctr., Inc. v. Horton*, 926 So.2d 167, 181 (Miss. 2006).

Petitioner was deprived of her fundamental parental rights, her privacy rights, her right to be free from unwarranted seizure by the state and her substantive rights of equal protection and due process. U.S. Const. amend IV, V, XIV. The retroactive effect of the changes made by the court in this case violates the equal protection and due process rights afforded to Petitioner and all others similarly situated. U.S. Const. amend. XIV.

This action is a personal injury and wrongful death action which alleges mishandling of Petitioner's infant daughter's corpse and production by the state of the wrong corpse which Petitioner buried under the mistaken belief that it was her deceased infant. Subsequently, the state delivered a second body to Petitioner, that of her own child, which Petition also buried. Petitioner remains in possession of two deceased children. Only one is hers.

Two months later Petitioner was contacted by the state. A meeting occurred between representatives of the state and Petitioner. At that meeting, Petitioner was told that the state was still in possession of the body of her baby.

An offer of settlement was made by the state in a meeting. The state offered to pay the costs associated with both of the funerals. See Appendix H. Petitioner made no response to the representatives from the state regarding the offer.

On September 19, 2002, Petitioner's complaint was filed in the Circuit Court of the First Judicial District of Hinds County, alleging wrongful death, negligence and gross

negligence by University of Mississippi Medical Center, a state entity. No service of process was issued at that time.

The State of Mississippi applied a strict compliance standard to the notice provision until the early months of 1999. *Carr v. Town of Shubuta*, 733 So.2d 261 (Miss. 1999); *Reaves v. Randall*, 729 So.2d 1237 (Miss. 1998). In order to provide relief for citizens and comply with the legislative purpose in February 11, 1999 the Court in *Carr* overruled the strict compliance standard, applying substantial compliance to the notice provision. For the eight years prior to the ruling in this case the Mississippi Supreme Court mandated both substantial compliance and waiver in cases involving the insufficiency of the notice provision of Miss. Code Ann. Section 11-46-11.[1]

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[1] *Reaves v. Randall*, 729 So.2d 1237 (Miss.1998) (Withdrawn by the court March 26, 1999; substituted opinion on denial of rehearing of March 26, 1999, reported at, 1999 Miss. LEXIS 151); *Carr v. Town of Shubuta*, 733 So.2d 261 (Miss. 1999); *Lattimore v. City of Laurel*, 735 So.2d 400 (Miss. 1999); *Tenn. Valley Reg'l Housing Auth. v. Bailey*, 740 So.2d 869 (Miss. 1999); *City of Pascagoula v. Tomlinson*, 741 So.2d 224 (Miss. 1999); *Jackson v. City of Booneville*, 738 So.2d 1241 (Miss. 1999); *McNair v. Univ. of Miss. Med. Ctr.*, 742 So.2d 1078 (Miss. 1999); *Miss. Dep't of Public Safety, et al. v. Stringer*, 748 So.2d 662 (Miss. 1999) (where the court confirmed the substantial compliance standard but remanded for other reasons); *Overstreet v. George County Sch. Dist.*, 741 So.2d 965 (Miss. 1999); *Humphrey v. Ocean Springs Hosp.*, 749 So.2d 1044 (Miss. 1999); *The Housing Auth. of the City of Jackson v. Lampley*, 749 So.2d 134 (Miss. 1999); *Gale v. Nathaniel Thomas, et al.*, 759 So.2d 1150 (Miss. 1999); *Thornburg v. Magnolia Reg'l Med. Ctr.*, 741 So.2d 220 (Miss. 1999); *Powell v. City of Pascagoula*, 752 So.2d 999 (Miss. 1999); *Jackson v. City of Wiggins*, 760 So.2d 694 (Miss. 2000); *Leflore County v. Givens*, 754 So.2d 1223 (Miss. 2000); *McCrary v. City*

Note, this extensive list of cases includes two cases cited by the Mississippi Supreme Court in its opinion in the case before the Court today, *Davis* and *Wright*. In *Davis*, an earlier lawsuit against the same state hospital named in Petitioner's complaint, the court found the notice insufficient but applied the substantial compliance standard nonetheless, stating, "In the present case, Davis did not substantially comply with the MTCA's [§ 11-46-11] requirements." *Davis* at 402. Likewise, the *Wright* court applied the substantial compliance standard, quoting from *Gale* and *Carr*, two earlier cases validating the substantial compliance standard, "though substantial compliance with the notice provisions is sufficient, 'substantial compliance is not the same as, nor a substitute for, non-compliance.'" *Wright* at 366.

On discovery of her error, relying on the procedure mandated by the court for correction of errors in filing of the notice provision, counsel for Petitioner filed a motion for extension of time requesting an extension of one hundred twenty days in order to allow for adequate time for serving the notice provision of Miss. Code Ann. § 11-46-11.[2]

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of Biloxi,757 So.2d 978 (Miss. 2000); *Jones ex rel. Jones v. Miss. Sch. for the Blind*, 758 So.2d 428 (Miss. 2000); *Williams v. Toliver, et al.*, 759 So.2d 1195 (Miss. 2000); *Douglas v. Blackmon, et al.*, 759 So.2d 1217 (Miss. 2000); *Fairley v. George County, Miss., A Political Subdivision,* 871 So.2d 713 (Miss. 2004); *Williams v. Clay County, Miss.*, 861 So.2d 953, 977 (Miss. 2003); *Davis v. Hoss*, 869 So.2d 397 (Miss. 2004); *Harris v. Miss. Valley St. Univ., et al.*,873 So.2d 970 (Miss. 2004); *Wright v. Quesnel*, 876 So.2d 362 (Miss. 2004).

[2] *Jackson v. City of Wiggins*, 760 So.2d 694 (Miss. 2000); *City of Pascagoula v. Tomlinson*, 741 So.2d 224 (Miss. 1999); *Jackson v. City of Booneville*, 738 So.2d 1241 (Miss. 1999); *Williams v.*

The trial court allowed only a thirty day extension. The notice letter was mailed to the state on January 17, 2003. No further action was pursued by Petitioner until February 14, 2003. On that day, following the court's grant of a limited extension of time, the complaint was served on the state. The state was given a twenty-three day stay in the action at this time.

The state timely answered the complaint. The state did not file a motion raising the issue of insufficient notice under Miss. Code Ann. § 11-46-11. The state did not petition the court for a hearing nor did the state ask for a stay in the proceedings, all of which was required under the judicial interpretation of the day to avoid waiving the issue. Instead, the state sat on its rights and waited until the statute of limitations ran. On August 23rd of the following year, 2004; after the statute of limitations had run; 18 months and 9 days after receipt of the notice letter the state filed a motion for summary judgment with the trial court alleging a failure by Petitioner to satisfy the ninety day notice provision of Miss. Code Ann. § 11-46-11.

The trial court overruled the state's motion for summary judgment, concurrently ordering an additional ninety day stay in the proceedings. The order granting the stay specified it was made to allow the state "to avail itself of the opportunity to investigate the wrongful death and personal injury claims made by Plaintiff and to negotiate a possible settlement of these claims". See Appendix D. This gave the state the benefit of a stay of a total of one hundred twenty-three days, far greater than the ninety day stay prescribed by the statute.

Clay County, 861 So.2d 953, 977 (Miss. 2003); *Leflore County v. Givens*, 754 So.2d 1223, 1231-32 (Miss. 2000); *Jones ex rel. Jones v. Miss. Sch. for Blind*, 758 So.2d 428, 429 (Miss. 2000).

The trial court denied the state's motion for interlocutory appeal. Fourteen days later, the state filed a Petition for Interlocutory Appeal directly with the Mississippi Supreme Court. That court reversed and remanded the trial court order resulting in dismissal of Petitioner's claim.

This Mississippi Supreme Court decision changed the standard applied to the notice provision of Miss. Code Ann. Section 11-46-11 to strict compliance; eliminated the waiver provision by abrogating the rule which required the state to move for a stay in the proceedings or waive the affirmative defense of insufficient notice. The court revised their earlier opinions that had applied the substantial compliance standard in *Davis* and *Wright*. Then, the court applied these changes retroactively serving to dismiss not only the Petitioner's claim but all others similarly situated.

This is not a cause regulated by the Commerce Clause. There is no IRS lien, no contract dispute, no tax refund to administer, no narrowly tailored governmental interest that justifies the state's action. This is a case of the heart, not the wallet. The grief experienced when a parent loses a child defies description. Retroactive application of the changes made by the state in this case result in a gross inequity if this Mother is denied the simple solace that comes with knowing what happened and why.

Petitioner has a vested interest in not only resolving the issue of why her child died but also why she was given someone else's child to bury with her child's name tag intact on that child's wrist; she has a right to know whose child she keeps; why and where her child's body was wrongly held by the state for the two months before she was contacted; a God given natural right to have answers to her questions. The parents of the unclaimed child, hereinafter Baby X, have a right to know where their child's body rests; they have a right

to visit the grave site; a right to know the truth. She and all others similarly situated have a right to notice by the state before they lose fundamental constitutionally guaranteed rights.

Petitioner with this appeal has exhausted her options for redress of her grievances. This case cannot be refiled because the statute of limitations has run.

Factual Background. Wadreanna Quadashea Magee was born prematurely and died 12 days later due to the alleged gross negligence of the state. After the child's death and immediately before the funeral, the state turned over a body directly to the staff of the funeral home with an identification bracelet intact on the baby's wrist identifying this child as Petitioner's baby, Wadreanna. At the open casket funeral Petitioner saw the body for the first time since the child's death and insisted that it was not the body of her child. Others at the funeral persuaded her to allow the funeral to continue.

On September 7, 2002, the state took the unusual step of notifying Petitioner that they had mistakenly given her the body of the wrong child. In a meeting with representatives of the state, Petitioner was told that they still had the body of her daughter. At that meeting, the state offered to settle her claims by paying the costs of both funerals. Petitioner did not respond to this offer of settlement.

Lower Court Proceedings. Initially, the trial court ordered a thirty day extension of time after Petitioner's request for an extension of time of one hundred and twenty days in order to comply with the ninety day notice provision of Miss. Code Ann. § 11-46-11.

Eleven months later, the trial court denied the state's motion for summary judgment (eleven months prior) granting with that order an additional ninety day stay in the proceedings in order to allow the state to avail itself of the opportunity to investigate the wrongful death and personal injury claims of Petitioner and to negotiate a possible settlement.

The trial court then denied the state's motion for certification of interlocutory appeal.

The Mississippi Supreme Court granted the state's petition for interlocutory appeal and dismissed Petitioner's cause of action changing the standard applied to the notice provision from substantial compliance to strict compliance finding that the state did not waive the affirmative defense of failure to comply with the notice requirements of Miss. Code Ann. Section 11-46-11(2) and that dismissal, rather than a stay, was required when Petitioner failed to strictly comply with the notice provisions. These changes were then applied retroactively to all similarly situated parties in pending cases.

REASONS FOR GRANTING THE PETITION

The Constitutional Rights Involved

This state action is an infringement on Petitioner's God given unalienable rights to life, liberty and the pursuit of happiness. The Declaration of Independence, para. 2 (U.S. 1776). Petitioner was denied her natural right to bury only her child. She was denied fundamental rights explicitly and implicitly guaranteed by the constitution due to the wrongful acts of the state.

As a result of the actions of the state courts, Petitioner is unable to pursue her claim, unable to discover the identity of one of these children, unable to find closure regarding the circumstances that caused her child's death and unable to find the parents of the child's body that she buried. Through judicial decision, she has been deprived of her fundamental liberty rights as explicitly and implicitly guaranteed under the Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution. U.S. Const. amend IV, V, IX; *Griswold et al. v. Conn.*, 381 U.S. 479, 484-485 (1965) (quoting *Mapp v. Ohio*, 367 U.S. 643, 656 (1961). *See also Boyd v. U.S.*, 116 U.S. 616, 630 (1986); *Zablocki, Milwaukee County Clerk v. Redhail*, 434 U.S. 374, 384 (1978). She has been deprived of her right to equal protection and to substantive due process under the Fourteenth Amendment. U.S. Const. amend XIV.

It is a clear deprivation of Petitioner's fundamental liberty interests and due process rights under the Fourth, Fifth, and Fourteenth Amendments for the court to admonish Petitioner's counsel for failure to strictly apply the notice provision of Miss. Code Ann. § 11-46-11 when the standard at the time was one of substantial compliance. U.S. Const. amend. IV, V, XIV. The substantial compliance standard applied to the notice provision from 1998 forward for eight

consecutive years. *See* Footnote 1. It is patently unfair and grossly repugnant to the Constitution for Petitioner to be dealt the ultimate sanction of dismissal because the Mississippi Supreme Court judicially decided to change the rules of the game in midstream and apply them retroactively depriving Petitioner of notice that the procedure mandated by the court was changing which deprived her of due process and equal protection.

Finding that the Bill of Rights has certain penumbras that give them "life and substance", the Court found a fundamental right to be secure in freedom from unwarranted seizure by the state. *Griswold et al. v. Conn.*, 381 U.S. 479, 484 (1965) quoting *Poe v. Ullman*, 367 U.S. 497, 516-522 (dissenting opinion); *Cruzan, By her Parents and Co-Guardians, Cruzan et ux. v. Director, Mo. Department of Health, et al,* 497 U.S. 261, 269 (1990). Petitioner's fundamental right to privacy emanates from these rights. *Griswold* at 483. Petitioner has a liberty interest in the care, custody and control of her children protected by the substantive component of the due process clause of the Fourteenth Amendment.[3] This Court has recognized care, custody and control of one's children to be a "basic civil right of man" finding it to be, as we all know in our hearts, "far

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[3] U.S. Const amend. XIV; *Troxel et vir. v. Granville*, 530 U.S. 57 (2000) (where the court speaking about the fundamental right of parents regarding care, custody and control of their children found a "heightened protection against government interference with certain fundamental rights and liberty interests"); *Zablocki, Milwaukee County Clerk v. Redhail*, 434 U.S. 374 (1978) (where the court found a fundamental privacy right implicit in the Fourteenth Amendment's Due Process Clause to "marry, establish a home and bring up children".)

more precious than property rights." *Stanley v. Ill.*, 405 U.S. 645, 651 (1972) (Citations omitted).

The Fourth Amendment protects Petitioner, and her child, by providing the right for individuals to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" absent probable cause. U.S. Const. amend. IV. In *Cruzan* the Court found "no right more sacred"or "more closely guarded" right than to be "free from all restraint or interference of others, unless by clear and unquestionable authority of law". *Cruzan* at 656; *see also Mapp v. Ohio,* 367 U.S. 643, 656 (1961). The state wrongfully withheld Petitioner's dead child from her for months. This incredible seizure with no due process was an unconstitutional violation of Petitioner's Fourth Amendment rights. U.S. Const. amend. IV.

Petitioner's child had a right to be secure in her person from unwarranted seizure by the state. U.S. Const amend. IV, XIV; *Cruzan* at 269. This fundamental right was violated by the state when Petitioner's child was wrongfully withheld from Petitioner for months before they released her to be finally buried.

Violating her right to substantive due process and equal protection guaranteed by the Fourteenth Amendment, the state deprived Petitioner of her fundamental liberty to be secure in the privacies of life as guaranteed by the Fourth Amendment. *Boyd* at 630.

Speaking on the issue of marriage, the Court opined that the sacred right of marriage is older than any privacy right guaranteed by our political system. *Griswold* at 486. Cannot the very same logic be applied to the sacred act of burial of one's child? Petitioner's fundamental right to bury her child immediately following the child's death and, further, to bury

only her child must be recognized by this Court as not only a fundamental right, but indeed, a natural right that is more basic, more demanding of sanctity and respect than possibly any other. Indeed, Petitioner's right to know what caused her child's death and the circumstances that surrounded her death are of no less importance.

Under the Fourteenth Amendment, Petitioner, and all others similarly situated, have constitutionally protected fundamental liberty interests in the care, custody and control of their children. U.S. Const. amend. XIV; *Troxel, et vir. v. Granville*, 530 U.S. 57 (2000). In *Stanley* this Court, speaking on deprivation of parental rights, found that "the rights to conceive and raise one's children have been deemed essential, basic civil rights of man". *Stanley* at 651. Parental rights do not end with the death of a child. A Mother has a right to bury her child and only her child. The state's action wrongly deprived the parents of Baby X the right to bury their child and deprived Petitioner of the right to bury only her child.

The Court recognized a fundamental liberty interest in privacy from the penumbra of rights guaranteed in the constitution in *Griswold* which are applicable to Petitioner's cause. The penumbra of rights emanating from the Fourth and Fifth Amendments protect against "all governmental invasions 'of the sanctity of a man's home and the privacies of life'." *Griswold* at 484-85. Petitioner's privacy was grossly invaded by the state's wrongful act. The state provided her with another child's body to bury instead of the body of her own child; withheld her child's body from her for months following the child's death; then, callously dismissed her lawsuit for a technical error of timing of a notice provision.

Petitioner has a vested cause of action in her lawsuit; this creates a property right of which Petitioner cannot be deprived of without due process of law. *Gibbes v. Zimmerman,* 290 U.S. 326, 332 (1933); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). The vested right is created at the moment the cause of action accrues, and thereafter, the plaintiff cannot be constitutionally deprived of this right without due process of law. *Brown v. R.J. Reynolds Tobacco Co.,* 52 F.3d 524, 530 (5th Cir. 1995). In tort cases, the cause of action vests when the injury occurs. *Mathis v. Eli Lilly & Co.,* 719 F.2d 134, 141 (6th Cir. 1983). The Fourteenth Amendment due process clause guarantees the preservation of a person's substantive right to redress by some effective procedure. *Gibbes* at 332; *Logan* at 428.

Due Process Requirements for Imposing the Ultimate Sanction of Dismissal

The Mississippi Supreme Court in this case arbitrarily changed the standard applied to the ninety day notice provision in Miss. Code Ann. § 11-46-11 from substantial compliance to strict compliance. With no forewarning to Petitioner or others similarly situated, it abrogated the rule requiring the state to move for a stay if the notice was inadequate. It changed the requirement that the state must affirmatively plead and have a hearing on the affirmative defense within eight months "absent extreme and unusual circumstances" or the issue is rightly waived. *Miss. Credit Ctr., Inc. v. Horton* at 181. It refused to make even a passing attempt to apply the Constitutional guarantees under *Harper* and *Chevron. Harper v. Va. Dep't of Taxation,* 509 U.S. 86 (1993); *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). It failed to follow its own rulings set out in a case decided by the very same court just weeks prior to the ruling in this case. *Miss. Credit Ctr., Inc.* at 181.

The court administered the ultimate sanction by dismissing Petitioner's case. This is a clear deprivation of Petitioner's fundamental rights, equal protection and substantive due process with no overriding, compelling governmental interest. When weighed against the hardship and inequity caused by the court's retroactive ruling, there can be no narrowly tailored state interest with a compelling state purpose that justifies these capricious acts.

The Mississippi Supreme Court overturned clear past precedent on which the Petitioner justifiably relied. *See* Footnote 1. This ruling stunned the legal community. The Associated Press circulated the news under the byline of "High Court Nixes Suit on Wrong Baby. Woman claims her daughter found in morgue after being given child to bury". See Appendix G.

The notice provision of Miss. Code Ann. § 11-46-11 was not intended as a snare for the unwary to be cheated out of their day in court through procedural technicalities. It was intended by the Legislature to provide an opportunity for an injured party and the state to reach a mutually agreeable settlement without unnecessarily burdening an already overtaxed judiciary. *Carr v. Town of Shubuta* 733 So.2d 261 (Miss. 1999). Speaking specifically about the intent of the Legislature, the *Carr* court noted:

> The purpose of the notice statute being to advise the city of the accident so that it may promptly investigate the surrounding circumstances, we see no need to endorse a policy which renders the statute a trap for the unwary where such purpose has in fact been satisfied.

Carr at 263.

The Mississippi Supreme Court has gone very far afield in this ruling from the clear intent of the Legislature with this complete and utter reversal of the court's earlier rulings and precedent.

Writing for a unanimous court, presiding Chief Justice Smith, the very same justice writing the opinion the case before the Court today, previously found substantial compliance on identical circumstances of the reverse order of filing the complaint first and then the ninety day notice provision. *Jackson v. City of Booneville*, 738 So.2d 1241 (Miss. 1999). Finding substantial compliance, the court in *Jackson v. City of Booneville* found that by filing her complaint first, Jackson had "simply reversed the order which the statute requires, *i.e.* first the notice of claim and then file suit." The court found that jurisdiction attaches for purposes of the act when the simple requirements of the Act have been met within the statute of limitations, "albeit in reverse chronological order." *Jackson v. City of Booneville* at 1246. This is exactly what Petitioner did.

Petitioner relied on the judicial interpretation of substantial compliance of the notice provision of Miss. Code Ann.§ 11-46-11 in effect when she filed her case. The Mississippi Supreme Court left no doubt in Petitioner's mind as to the proper standard to apply when she realized the deficiency in the notice. It spoke on the issue of whether strict compliance or substantial compliance was the preferable standard to apply to a notice provision under a tort immunity act in *Powell v. City of Pascagoula* noting that the majority of courts in other jurisdictions find the substantial compliance standard to be just. The *Powell* court, quoting the *McClintock* opinion from Illinois with approval, stated: "...'to insist on strict compliance with the statute's service requirements. . . would not only serve no legitimate purpose,

it would be fundamentally unjust.' The court reasoned, 'it would merely consign a presumptively valid claim to oblivion for technical reasons which have nothing to do with protecting defendant's rights or the public." [4]

In *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers,* 357 U.S. 197, 209 (1958), this Court held that there are constitutional limitations on the power of the courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of the cause. In that case, this Court held that the sanction of dismissal denying a hearing on the merits could not be imposed where the petitioners extensive efforts at compliance with procedural rules demonstrate the failure to comply was not due to willfulness, bad faith, or any fault of petitioner. In such circumstances, dismissal violated the constitutional prohibition against deprivation of property without due process of law. *Id.* at 208-213. *See also Logan* at 429-430; U.S. Const. amend. XIV.

In the case before the Court today, the Mississippi Supreme Court imposed the ultimate sanction of dismissal on Petitioner because shortly after her case was filed her counsel followed the procedure specifically mandated in controlling

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[4] *Powell v City of Pascagoula*, 752 So.2d 999 (Miss. 1999) quoting with approval *McClintock v. Bi-State Dev. Agency,* 591 N.E.2d 967, 971 (Ill. App. Ct. 1992). *See also Cameron v. City of Gilroy,* 104 Cal. App. 2d 76 (Cal. Dist. Ct. App. 1951); *Anderson v. San Joaquin County*, 97 Cal. App. 2d 330 (Cal. Dist. Ct. App. 1950); *State Dep't of Natural Resources v. City of Waukesha,* 515 N.W.2d 888, 890 (Wisc. 1994).

decisions.[5] *City of Pascagoula* left no doubt in the procedure for dealing with defects in the timing of notice under Miss. Code Ann. Section 11-46-11. It directed parties and the trial courts on the proper procedure to follow saying:

> We conclude that the better approach is, instead, *for a governmental entity to request that the trial court issue an order staying the lawsuit until such time as the entity has been given the benefit of the applicable waiting period.* The trial courts of this State have the inherent authority to grant such stays, and *we direct that such orders be granted as necessary to ensure that a governmental entity is given the benefit of the waiting period.* In the event that the trial court finds the requirements of the waiting period to have been violated, the governmental entity should be permitted to recover any expenses (including court costs and attorney's fees) which it incurs in obtaining a stay of the proceedings. M.R.C.P. 11(b); Miss. Code Ann. § 11-55-5 (1) (Supp. 1998). *In cases in which no such stay is requested, however, the issue should properly be considered to have been waived.*

City of Pascagoula v. Tomlinson at 228-229.

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[5] *City of Pascagoula v. Tomlinson*, 741 So.2d 224 (Miss. 1999); *Jackson v. City of Booneville*, 738 So.2d 1241, 1246 (Miss. 1999); *Leflore County v. Givens*, 754 So.2d 1223, 1232 (Miss. 2000); *Jackson v. City of Wiggins*, 760 So.2d 694, 696 (Miss. 2000); *Jones ex rel. Jones v. Miss. Sch. for the Blind*, 758 So.2d 428, 429 (Miss. 2000); *Ray v. Ray A. Keith, et al*, 859 So.2d 995 (Miss. 2003); *Davis v. Hoss*, 869 So.2d 397 (Miss. 2004).

The Mississippi Supreme Court reemphasized its direction to follow this stay/waiver procedure in four more decisions.[6]

The statute of limitations passed before the court gave any inkling that a different procedure should be followed. Nearly three years later and after Petitioner filed her lawsuit, the Mississippi Supreme Court imposed the ultimate sanction of dismissal and deprived Petitioner of the right to present her case on the merits because her counsel did not have a sufficient crystal ball to foresee that the court would change the procedure, abolish the criteria for waiver of the defense and apply these changes retroactively before her case reached final judgment.

It would be hard to find a case where the sanction of dismissal is more of an affront to due process under the Fourteenth Amendment. Petitioner made extensive efforts to comply with the procedure set out by the Mississippi Supreme Court for cases with identical procedural issues, i.e. filing of the notice letter following filing of the complaint. If a state court cannot deprive the petitioner of her right to a hearing on the merits of her case without due process of law under the Fourteenth Amendment, then a state court cannot deprive Petitioner of her right to a hearing on the merits of her case as a sanction for following the specific directions of that same court as to the proper procedure in the matter. U.S. Const. amend. XIV.

Petitioner substantially complied with the ninety day notice provision of Miss. Code Ann. § 11-46-11 by making

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[6] *Jackson v. City of Booneville*, 738 So.2d 1241, 1246 (Miss. 1999) *Leflore County v. Givens*, 754 So.2d 1223,1232 (Miss. 2000); *Jackson v. City of Wiggins*, 760 So.2d 694, 696 (Miss. 2000); *Jones ex rel. Jones v. Miss. Sch. for the Blind*, 758 So.2d 428, 429 (Miss. 2000).

reasonable, good faith efforts to give the state adequate notice pursuant to the Mississippi Supreme Court's eight year precedential rulings mandating substantial compliance and waiver which were in effect throughout the litigation. *See* Footnote 1.

The state suffered no actual prejudice from Petitioner's actions. The state actually benefitted from, not ninety days as the statute requires to investigate the claim, but an actual stay in the proceedings of 113 days as a result of Petitioner's good faith efforts and the trial court's grant of an additional ninety day stay in the proceeding. The state received a benefit of an additional twenty-three day stay in the litigation beyond that afforded by the Legislature to other state defendants under the statute.

Waiver

The waiver provision was specifically provided by judicial decision as early as 1999 and followed for eight years in a long line of unbroken cases. *See* Footnote 1. Abrogation of the rule requiring the state to move for a stay in the proceedings or waive the issue was completely unprecedented.

Petitioner relied on the judicially applied waiver provisions of Miss. Code Ann. § 11-46-11 in effect during the course of litigation. In *City of Pascagoula* the court enunciated the proper procedure to follow if the trial court found that the injured party had failed to comply with the ninety day waiting period, finding the dismissal of a lawsuit based on a failure to comply with the waiting period to be a "disproportionate remedy and contrary to the purposes of the Legislature in enacting the Tort Claims Act." *City of Pascagoula v. Tomlinson* at 228. The court concluded in that case that a better approach is for the governmental entity to request a stay in the lawsuit to be given the benefit of the

applicable waiting period. *City of Pascagoula* at 228. If no stay is requested by the governmental entity, the court found that the issue should properly be waived. *City of Pascagoula* at 229. The court, by providing for a stay in the proceedings at the request of the governmental entity spoke to the equities involved. Granting a stay, the court opined, avoided the disproportionate remedy of dismissing the lawsuit while at the same time ensuring that a failure to abide with the waiting period is not free of adverse consequences for the plaintiff. *City of Pascagoula* at 229; *See also Jackson v. City of Booneville*, 738 So.2d 1241 (Miss. 1999). The record reveals in *Easterling*, the case before the court today, that the governmental entity at no time requested a stay.

In this case, the Mississippi Supreme Court reversed its earlier position on waiver under Miss. Code Ann.§ 11-46-11. In a long line of unbroken cases the court held that the state waived its defense of lack of proper notice under Miss. Code Ann.§ 11-46-11 if it failed to request a stay.[7]

Just weeks before this case was decided by the Mississippi Supreme Court, the court decided *Miss. Credit Ctr., Inc. v. Horton*, 926 So.2d 167 (Miss. 2006) finding that a defendant who fails to promptly, actively pursue an affirmative defense or affirmative right which would serve to terminate or stay the litigation by raising it in a pleading, bringing it to the

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[7] *City of Pascagoula v. Tomlinson,* 741 So.2d 224 (Miss. 1999); *Jackson v. City of Booneville*, 738 So.2d 1241, 1246 (Miss. 1999) *Leflore County v. Givens,* 754 So.2d 1223,1232 (Miss. 2000); *Jackson v. City of Wiggins*, 760 So.2d 694, 696 (Miss. 2000); *Jones ex rel. Jones v. Miss. Sch. for the Blind*, 758 So.2d 428, 429 (Miss. 2000). *Ray v Ray A. Keith and Lee County, Miss., By and Through Lee County Bd. of Supervisors*, 859 So.2d 995 (Miss. 2003).

court's attention in a motion and requesting a hearing waives that defense or right. It held that an unjustified delay of eight months in bringing the matter to the court's attention and requesting a hearing constituted waiver as a matter of law. And it held that its ruling applied to all affirmative defenses, not just the one raised in that case. *Miss. Credit Ctr., Inc. v. Horton* at 180.

The defense on which the Mississippi Supreme Court dismissed Petitioner's case is an affirmative defense. *Powell v. City of Pascagoula* at 1001; *Henderson v. Un-Named Emergency Room, Madison County Med. Ctr., et al.*, 758 So.2d 422, 423 (Miss. 2000). In the case before the Court today, the Mississippi Supreme Court deprived Petitioner of her right to be heard on the merits of her case under the guise of the principle that a change in the law is applied retroactively to cases pending review on appeal. It did not apply *Horton* which also changed the law while this case was pending on appeal and provided alternate grounds for waiver. This uneven-handed, retroactive application of the law violated Petitioner's equal protection and due process rights under the Fourteenth Amendment and added further to the fundamental unfairness by which Petitioner was deprived of her fundamental right to be heard on the merits.

Strict Compliance Deprives Petitioner of Her Fundamental Rights Without Due Process of Law

The state was aware of Petitioner's injuries and communicated directly with her. They made an initial offer to settle the claim for the price of two funerals. The Mississippi Supreme Court has decided that if the state communicated with the injured party and made settlement offers that this actual notice equated to substantial compliance with the notice provision of Miss. Code Ann. § 11-46-11. *Ferrer v. Jackson County Bd. of Supervisors, et al.*, 741

So.2d 216, 217 (Miss. 1999). The court in *Ferrer* found that the injured party had met the standard of substantial compliance because there was a series of payments, letters and settlement offers between the parties but no actual notice letter had been delivered, specifically stating in Large Bold Letters, **"FERRER MET THE REQUIREMENTS OF THE STATUTE BY GIVING ACTUAL, COMPREHENSIVE, AND DETAILED NOTICE TO THE PROPER AUTHORITY IN A TIMELY MANNER."** In the case before the Court today, like *Ferrer*, the state had actual notice and had made at least one settlement offer to Petitioner to settle the matter for the price of two funerals prior to the filing of the lawsuit. *Ferrer* at 217. It is implausible that the State was unaware of the pending action following the meeting with Petitioner when she was told by the State of its error.

Prospective v. Retrospective Application of Changes in the Law

Crowe v. Bolduc, 365 F.3d 86 (1st Cir. 2004) sets forth the current state of the law on prospective versus retrospective application of changes in the law by judicial decision making. As a general rule, judicial decisions are retroactive in the sense that they apply both to the parties in the case before the court and to all other parties in pending cases. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1991); *Amann v. Town of Stow*, 991 F.2d 929, 934 (1st Cir. 1993) (*per curiam*). This rule while absolute in the criminal context, in civil cases there is an equitable exception. *Griffith v. Kentucky*, 479 U.S. 314 (1987); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971); *See also Am. Trucking Ass'n, Inc. v. Smith*, 496 U.S. 167, 178 (1990) (plurality op.) (reaffirming preeminence of *Chevron* in the civil context post-*Griffith*).

The *Chevron* exception operates along the following lines. A court in a civil case may apply a decision purely prospectively, binding neither the parties before it nor similarly situated parties in other pending cases, depending on the answers to three questions. First: does the court's decision announce a new and unexpected rule of law, by, say, overruling settled precedent on which the parties may have relied? Second: does the history of the jurisprudence in the affected area of the law, together with the new rule's purpose and effect, counsel for or against retroactive application? Third: would retroactive application give rise to a substantial inequity? *Chevron* at 106-107. Selective retroactivity and prospectivity, however, are not permissible; if a new rule is applied to the parties in the rule-creating case, then it must be applied in the same manner to similarly situated parties in all pending cases. *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993). In a civil case, a court has two available options: pure prospectivity or full retroactivity. *Glazner v. Glazner*, 347 F.3d 1212, 1218 (11th Cir. 2003) (*en banc*); *George v. Camacho*, 119 F.3d 1393, 1399 (9th Cir. 1997) (*en banc*). *Id.* at 93; *See also Jazz Photo Corp. v. Dreier LLP*, No. 05-5198, 2006 U.S. Dist. LEXIS 14559 (D.N.J. Mar. 15, 2006).

Harper tells us that the application must be universal, either all prospective or entirely retroactive, but the application cannot be determined on a case by case basis.

Then, in *Reynoldsville Casket Co.* the Court states, "She concedes that *Harper* overruled *Chevron* insofar as the case (selectively) permitted the prospective-only application of a new rule of law," going on to say:

> The Ohio Supreme Court's justification for refusing to dismiss Hyde's suit is that she, and others like her, may have reasonably relied upon pre-*Bendix* law—a

> reliance of the same kind and degree as that involved in *Chevron*. But, this type of justification–often present when prior law is overruled–is the very sort that this Court, in *Harper*, found insufficient to deny retroactive application of a new legal rule (that had been applied in the case that first announced it)."

Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 751-755 (1995).

Following that ruling, the Court of Appeals for the Eleventh Circuit, in a delightfully succinct analysis of the issue of *ex post facto* and retrospective versus prospective application of the law applied the *Chevron* factors. *Glazner v. Glazner*, 347 F.3d 1212 (11th Cir. 2003). In a subsequent case, following that ruling, the District Court of Maine found *Chevron* to be grounds for a purely prospective application of a change in the law. *Crowe v. Bolduc*, 365 F.3d 86 (1st Cir. 2004).

The District Court of New Jersey in March, 2006 stating that *"Harper* overruled *Chevron Oil* insofar as the case (selectively) permitted the prospective-only application of a new rule of law", then, recognized and applied the *Chevron* factors finding for a retrospective application. The New Jersey court quoting the *Beam Distilling Co.* court stated:

> Once a retroactive application is chosen for any assuredly new rule, it is chosen for all others who might seek its prospective application. The applicability of rules of law is not to be switched on and off according to individual hardship...when the Court has applied a rule of law to the litigants of one case it must do so with respect to all others not barred by procedural requirements or res judicata.

Jazz Photo Corp. v. Dreier LLP, No. 05-5198, 2006 U.S. Dist. Lexis 14559 (D.N.J. Mar. 15, 2006).

The Mississippi Supreme Court refused to even consider this equitable exception, creating a split of authority. The equitable exception clearly applies to the present case indicating that the court should have applied the changes prospectively. To do otherwise unfairly deprives Petitioner and others similarly situated whose judgments are not yet final of their fundamental liberties, equal protection and due process rights.

It is very clear that this decision overrules clear past precedent on which Petitioner, other similarly situated parties and the trial courts relied. Following *City of Pascagoula* and its progeny, those earlier decisions "directed" parties and the courts as to the proper procedure to follow when the lawsuit was filed less than ninety days after the notice; directed courts not to dismiss such cases but to grant a stay and to declare the defense waived if the stay was not requested by the state entity. *City of Pascagoula v. Tomlinson*, 741 So.2d 224 (Miss. 1999). In fact, the identical circumstance of the timing of the ninety day notice to Miss. Code Ann. § 11-46-11 being delivered after the filing of the lawsuit was ruled on by the court in *City of Booneville* with a unanimous court finding that the reverse order of notice and filing met the substantial compliance standard. *Jackson v. City of Booneville*, 738 So.2d 1241 (Miss. 1999).

Because it has been impossible to predict what the court would do next, it is inherently unfair to penalize plaintiffs for not having a crystal ball sufficient to tell them what the law would be by the time their cases became final. Most importantly, retroactive application in this case gives rise to substantial inequity. It deprives Petitioner and others similarly situated of their right to a hearing on the merits

solely because their counsel followed the direction of the court at the time of discovery of a defect in the notice provisions. Such a result flies in the face of the basic precept of fundamental freedom, equal protection and due process violating Petitioner's opportunity to be heard before an imposition of sanctions.

CONCLUSION

Petitioner pleads to this Court for review of the grant of summary judgment rendered in *Univ. of Miss. Med. Ctr. v. Angela Easterling, et al.*, 928 So.2d 815 (Miss. 2006).

What happened to cause the alleged wrongful death of Petitioner's daughter? How did the unidentified child, referred to as Baby X in this pleading, die? Did the state entity put Petitioner's baby's identification bracelet on two children? Or, were they swapped at a later time? Why? Who are the parents of Baby X? Have the parents of Baby X been told where their child is buried? How can a state entity keep a child's body for two months and not notice? Where was Petitioner's child for that period of time? What happened to her body during the interim period?

In this case, the Mississippi Supreme Court imposed the ultimate sanction of dismissal and deprived Petitioner of her substantive rights as provided under the Fourteenth Amendment – her due process right to a hearing on the merits of her claim – solely because her counsel did not have a crystal ball to warn that directions of the court should not be explicitly followed because they were going to change the rules before the case reached final judgment. The imposition of the ultimate sanction in such circumstances violates Petitioner's fundamental rights be free from unreasonable search and seizures under the Fourth Amendment; her right to be free from deprivation of life, liberty or property without

due process of law under the Fifth Amendment; her right to privacy under the penumbra of rights incumbent in the Fourth and Fourteenth Amendments, her right to equal protection and substantive due process under the Fourteenth Amendment. U.S. Const. amends. IV, V, XIV.

Petitioner was deprived of her fundamental parental rights, privacy rights, her right to be free from unwarranted seizure by the state and her substantive rights of equal protection and due process as afforded to her under the Fourth, Fifth and Fourteenth Amendments to the U.S. Constitution. U.S. Const. amends. IV, V, XIV. The retroactive effect of the changes made by the court in this case violate the equal protection and due process rights afforded to Petitioner and all others similarly situated. U.S. Const. amend. XIV.

Equal Protection and Due Process are fundamentally protected rights under the Fourteenth Amendment. U.S. Const. amend. XIV. The same right of access to the courts for redress of wrongs is guaranteed by the Mississippi Constitution. Miss. Const. art. III, sec. 24. By altering the standard to strict compliance for the notice provision of Miss. Code Ann. § 11-46-11, the Mississippi Supreme Court has deprived Petitioner of her right to access to the courts under both state and federal constitutional law. It is not the statute that has denied Petitioner access to the courts. It is the Mississippi Supreme Court's interpretation that removed the substantial compliance standard, waiver provisions and retroactively altered the proper procedure to follow when there is a technical error made in the notice letter to the state.

The Mississippi Supreme Court has now taken Petitioner's substantive rights under the guise of misapplied judicial precedent. While *stare decisis* does not mean that the law is carved in stone, when decisions flip flop back and forth the

fundamental fairness of being on notice of what the law is and what remedies are available for technical errors is lost. When judicial decisions reach that level of unreliability, the fundamental fairness guaranteed by due process evaporates.

The Constitution provides that Congress can pass no *ex post facto* laws. U.S. Const. art. I, § 10. While this Constitutional guarantee does not apply to judicial action, the same intent is found in the Due Process clause which has been found to restrict the judiciary. *Glazner v. Glazner*, 347 F.3d 1212 (11th Cir. 2003).

A basic foundation of freedom from a tyrannical government, the comfort that our citizens rely on, is the fact that a man cannot be arrested and then have the state invent a crime to charge him with. That is tyranny.

Gelpcke v. Dubuque, 68 U.S. 175 (1864) tells us the very same thing. The state cannot invent the offense and retroactively punish the offender for violation of a law that did not exist when the action occurred. Citizens of the Country have the right to notice of the change in the law before they are deprived of their fundamental rights. That is the essence of Due Process and Equal Protection.

In this case, as in *Gelpcke,* the Mississippi Supreme Court did not provide Petitioner any notice of change in the law and then applied the change retroactively to deprive her of her fundamental and human rights. As in *Gelpecke*, "a State tribunal has erected the altar and decreed the sacrifice." *Gelpcke* at 206.

It is with great reverence that Petitioner pleads with this Court for justice.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF MISSISSIPPI
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June 1, 2006

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 1st day of June, 2006.

Supreme Court Case # 2004-IA-02360-SCT
Trial Court Case # 251-02-001251-CIV

University of Mississippi Medical Center v. Angela Easterling as Personal Representative of the Wrongful Death Beneficiary of Wadreanna Quadashsea Magee.

Motion for Rehearing filed by appellee is denied. Diaz, Easley, Graves and Randolph, JL, would grant.

APPENDIX B

SUPREME COURT OF MISSISSIPPI

Case No. 2004-IA-02360-SCT

[Filed April 6, 2006]

UNIVERSITY OF MISSISSIPPI MEDICAL CENTER, *Defendant-Appellant*,	)
v.	)
ANGELA EASTERLING AS PERSONAL REPRESENTATIVE OF THE WRONGFUL DEATH BENEFICIARY OF WADREANNA QUADASHSEA MAGEE *Plaintiff-Appellee*	)

BEFORE: SMITH, Chief Justice. WALLER and COBB, P.JJ., CARLSON, DICKINSON and RANDOLPH, JJ., concur. EASLEY, J., dissents with separate written opinion joined in part by GRAVES, J. DIAZ, J., not participating.

OPINION

EN BANC.

SMITH, Chief Justice, for the Court:

This case is before this Court on appeal from the Circuit Court of the First Judicial District of Hinds County, Mississippi, by the defendant University of Mississippi Medical Center ("UMMC"). UMMC seeks a review of the trial court's order denying its motion for summary judgment. UMMC alleges plaintiff Angela Easterling ("Easterling"), mother and personal representative of Wadreanna Quadashsea Magee ("Wadreanna"), failed to comply with Miss. Code Ann. Section 11-46-11(1) (Rev. 2002), when Easterling failed to send notice to UMMC ninety days before filing suit. In the alternative, UMMC asserts Easterling failed to provide the appropriate claims within her notice as prescribed under section 11-46-11(2).

We adhere to our controlling cases of *Davis v. Hoss*, 869 So.2d 397 (Miss. 2004), and *Wright v. Quesnel*, 876 So.2d 362 (Miss. 2004), and accordingly find that Easterling failed to follow the ninety-day notice rule which this Court strictly enforces. We reverse the trial court's decision and render in favor of UMMC.

FACTS

Wadreanna was born twelve weeks premature on June 26, 2002. Wadreanna died twelve days later and just after UMMC performed an exploratory laparotomy procedure. On July 10, 2002, during an open casket funeral, Easterling saw for the first time what was supposed to be the body of her dead baby. Although the wristband on the infant's wrist

identified the body as that of Wadreanna, Easterling insisted the body in the casket was not her daughter. Nevertheless, after her friends convinced Easterling the body was Wadreanna's, Easterling went ahead with the burial.

Approximately two months later on September 7, 2002, UMMC contacted Easterling and informed her that the infant she buried was not her daughter. Further, UMMC revealed that Wadreanna's body was still in the hospital morgue. During a meeting between the parties, UMMC presented Easterling with pictures of her daughter's body and allowed Easterling to visit the morgue to identify the body. Subsequent to the meeting, UMMC tendered Wadreanna's body to Easterling, who was finally able to bury her daughter.

With no effort to comply with the statutory notice requirements, Easterling filed suit against UMMC on September 19, 2002. Before service on UMMC, Easterling recognized her failure to comply with Miss. Code Ann. Section 11-46-11. Rather than seeking a Rule 41(a)(1)(i) dismissal, and then complying with the statute, Easterling inexplicably filed a Motion for Extension of Time to Complete Service of Process on January 17, 2003, stating, "Plaintiffs' counsel has not served Defendants because the case is not ripe due to the notice required by § 11-46-11 of the Mississippi Code of 1972, as amended." Easterling elected to file the notice of claim to UMMC on the same day, January 17, 2003. One month later, Easterling served process on UMMC.

UMMC subsequently filed a Motion for Summary Judgment claiming Easterling failed to comply with section 11-46-11(1), which requires a plaintiff to send a state entity notice of a claim ninety days before filing suit. The trial court denied UMMC's motion and instead, ordered a ninety-

day stay in the proceedings to allow UMMC to avail themselves of the opportunity to investigate Easterling's wrongful death and personal injury claims, as well as to negotiate a possible settlement of the claims.

As a result of the trial court's order, UMMC filed a Motion Requesting Certification for Interlocutory Appeal. The circuit court denied UMMC's motion. UMMC now appeals to this Court from the trial court's order.

STANDARD OF REVIEW

This Court reviews summary judgments de novo. *Davis*, 869 So.2d at 401. Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Miss. R. Civ. P. 56(c). "The evidence is viewed in the light most favorable to the party opposing the motion." *Davis*, 869 So.2d at 401. "If there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment should be entered in his favor." *Id.* The moving party bears the burden of demonstrating there is no genuine issue of material fact. *Id.*

ISSUES

I. Whether the Plaintiff Failed to Comply with the Ninety-day Notice Requirement When She Filed Her Complaint More than Four Months Before Issuing Notice to the Defendant.

II. Whether the Plaintiff Failed to Substantially Comply with the Notice Provisions When She Failed to Include

Her Medical Malpractice and Wrongful Death Claims in Her Written Notice.

DISCUSSION

Issue I controls, therefore we need not discuss issue II.

I. Whether the Plaintiff Failed to Comply with the Ninety-day Notice Requirement When She Filed Her Complaint More than Four Months Before Issuing Notice to the Defendant.

This case deals with a plaintiff's upsetting and alarming ordeal and the harsh results that ensue from the plaintiff's failure to follow proper procedure. UMMC claims that because Easterling failed to give UMMC notice ninety days before filing her lawsuit, the trial court erred when it denied UMMC's motion for summary judgment. On the other hand, Easterling claims she substantially complied with the requirement, or, in the alternative, UMMC waived the ninety-day notice period by not requesting a stay.

The Mississippi Tort Claims Act ("MTCA") sets forth procedures a claimant must follow in order to assert a claim against a government entity. The relevant rule states:

> After all procedures within a governmental entity have been exhausted, any person having a claim for injury arising under the provisions of this chapter against a governmental entity or its employee shall proceed as he might in any action at law or in equity; provided, however, that ninety (90) days prior to maintaining an action thereon, such person shall file a notice of claim with the chief executive officer of the governmental entity.

§ 11-46-11(1). Because UMMC is an entity of the state, a claimant is subject to the requirements of the MTCA. *See* Section 11-46-1(j).

In the case at bar, Easterling argues she complied with the notice provisions and cites as authority *Jackson v. City of Wiggins*, 760 So.2d 694 (Miss. 2000), *City of Pascagoula v. Tomlinson*, 741 So.2d 224 (Miss. 1999), and *Jackson v. City of Booneville*, 738 So.2d 1241 (Miss. 1999).

In *Tomlinson*, the plaintiff did not strictly follow the ninety-day notice requirement when he filed suit two weeks after providing notice of his claim. *Id.* at 228. Instead of dismissing the lawsuit, we held the proper remedy was to require the governmental entity to request a stay of the lawsuit. *Id.* This allowed the governmental entity to benefit from the applicable waiting period. *Id.* Should the governmental entity not request a stay, the issue would be considered waived. *Id.* at 229. *See also Williams v. Clay County*, 861 So.2d 953, 977 (Miss. 2003); *Leflore County v. Givens*, 754 So.2d 1223,1231-32 (Miss. 2000); *City of Wiggins*, 760 So.2d at 696; *Jones ex rel. Jones v. Miss. Sch. for Blind*, 758 So.2d 428, 429 (Miss. 2000); *City of Booneville*, 738 So.2d at 1246.

In *City of Booneville*, 738 So.2d at 1245, the plaintiff filed her complaint before giving notice to the defendant. Although the plaintiff gave notice and filed her complaint in reverse chronological order of what is required by the MTCA, this Court reaffirmed *Tomlinson* and held the proper remedy called for the governmental entity to file a motion to stay the lawsuit in order to benefit from the statutorily-mandated waiting period. *Id.* at 1246.

In *City of Wiggins*, 760 So.2d at 695, the plaintiff filed notice approximately sixty-seven days before he filed suit. Again, we cited *Tomlinson* and held "the City's sole remedy for Jackson's failure to comply with the ninety-day waiting period was to file a motion to stay the lawsuit, and the City's failure to file such a motion constituted a waiver of its right to object to Jackson's non-compliance with the waiting period." *Id.* at 696.

However, in 2004, this Court announced in *Davis*, 869 So.2d at 402, it was no longer the defendant's duty to request a stay or face a waiver of the ninety days when the plaintiff failed to comply with the statutory notice period, finding that a failure to wait ninety days after giving notice to file a claim was grounds for summary judgment. There, the plaintiff gave notice of his lawsuit on the same day he filed his suit. *Id.* Although this Court held the plaintiff failed to file suit before the MTCA one-year statute of limitations ran, this Court also held the plaintiff failed to comply with the ninety-day notice provision and affirmed the trial court's grant of summary judgment. *Id.*

Similarly, in *Wright*, 876 So.2d at 367, this Court held the plaintiff's suit was barred when the plaintiff filed suit after the one-year statute of limitations ran. *Id.* In addition, this court held the plaintiff failed to comply with the statute's notice provisions when the plaintiff gave notice only eleven days before filing her complaint. *Id.* at 366. We stated "allowing a plaintiff to file suit before ninety days have passed since noticing the claim is tantamount to reading out the notice provisions of the MTCA." *Id.* Again, for both the plaintiff's failure to file suit within the statute of limitations, as well as failing to abide by the ninety-day notice requirement, this Court held the plaintiff did not comply with Section 11-46-11,

and thus affirmed the trial court's entry of summary judgment. *Id.* at 367.

In the case at bar, UMMC contends both *Davis* and *Wright* are controlling and therefore the trial court erred when it refused to dismiss Easterling's suit for failure to adhere to the interpretation of the ninety-day notice rule as set forth in those cases. There is no doubt the language of *Davis* and *Wright* is in conflict with our prior rulings in which we have called for the defendant to request a stay of the proceedings. Today, this Court is provided an opportunity to clarify the ninety-day notice requirement under the post-1999 Section 11-46-11(1).

Although not explicitly stated in *Davis* and *Wright*, our ruling served to shift the responsibility to correct the plaintiff's failure to follow the ninety-day notice requirement from the defendant to the plaintiff. Because this Court handed down those cases while litigation was ongoing between the parties in the case at bar, we find UMMC is correct in their argument that *Davis* and *Wright* are controlling. *See Thompson v. City of Vicksburg*, 813 So.2d 717, 721 (Miss. 2002) (retroactive application of judicially articulated rulings applies to cases awaiting trial); *see also Anderson v. Anderson*, 692 So.2d 65, 70 (Miss. 1997) (change in the law applied retroactively to the case pending review on appeal).

Since its creation in 1993, the MTCA has undergone numerous amendments requiring evolving interpretation by the Mississippi Supreme Court. When the MTCA was enacted, this Court interpreted the notice of claim requirement under a strict compliance standard; however in early 1999, we began applying a substantial compliance standard to notice of claim. The language of the statute at that time required a plaintiff to file notice of claim before the expiration of the one

year statute of limitations, the filing of which tolled the statute of limitations for ninety-five days. Miss. Code Ann. § 11-46-11 (Supp. 1998). The first ninety days of this ninety-five days was designated for the benefit of the defendant to investigate and attempt settlement of the claim prior to facing a lawsuit. *Tomlinson*, 741 So.2d at 228. However, the old statute created a limited time frame in which a plaintiff could file a suit and was very difficult to comply with, causing the Court to retreat to the substantial compliance standard. However, in April of 1999, the Legislature amended Miss. Code Ann. Section 11-46-11 to remedy this concern. *Tomlinson* is distinguished from this case because its holding was based on the pre-1999 legislative amendment to Section 11-46-11, and Easterling's claim is not.

This Court finds Easterling failed to comply with the ninety-day notice requirement when she filed suit on September 19, 2002, almost four months before giving notice. Easterling had the option of dismissing her prematurely filed action, properly serving notice of her claim, and then waiting the ninety-day time period, and if Easterling's claims against UMMC were still unresolved, Easterling could properly have filed her action.

In order to make it perfectly clear to all that strict compliance is required, as stated in *Davis* and *Wright*, we hereby overrule *Tomlinson* and its progeny, including *Booneville*, *Givens*, *City of Wiggins*, *Mississippi School for Blind*, and *Clay County*,[1] but only as to those cases' analysis of the ninety-day notice requirement. In other words, the rule

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[1] In *Page v. Univ. of S. Miss.*, 878 So.2d 1003 (Miss. 2004), we overruled *Clay County* as to its application of the one-year statute of limitations in conjunction with the ninety-day notice requirement under section 11-46-11. Thus, *Page* is still good law.

set forth in *Tomlinson*, that the responsibility falls on the defendant to request a stay of the lawsuit when a plaintiff is not in compliance with the ninety-day notice requirement, is abrogated.

We do so today because of our constitutional mandate to faithfully apply the provisions of constitutionally enacted legislation. We also note that our decision today provides consistency. *E.g.*, *Newell v. Jones County*, 731 So.2d 580, 582 (Miss. 1999) (ten day time limit to file notice of appeal under Miss. Code Ann. Section 11-51-75 is both mandatory and jurisdictional); *Ivy v. GMAC*, 612 So.2d 1108, 1116 (Miss. 1992) (citing *Tandy Electronics, Inc. v. Fletcher*, 554 So.2d 308, 309-312 (Miss. 1989) (thirty-day limit to file notice of appeal to Mississippi's appellate courts is a "'hard-edged, mandatory' rule which this court 'strictly enforces.'"). Since the MTCA's passage in 1993, a considerable amount of time has passed for the legal profession to become aware of the ninety-day notice requirement in Section 11-46-11(1). *See* 1993 Miss. Laws 476. The result here, as in *Ivy*, is that the ninety-day notice requirement under Section 11-46-11(1) is a "hard-edged, mandatory rule which the Court strictly enforces." *Ivy*, 612 So.2d at 1116. Accordingly, we find the trial court erred in its ruling regarding this issue.

CONCLUSION

We hold the responsibility to comply with the ninety-day notice requirement under Section 11-46-11(1) lies with the plaintiff. After the plaintiff gives notice, he must wait the requisite ninety days before filing suit. Because Easterling failed to comply with the ninety-day waiting period, her case must be dismissed.

REVERSED AND RENDERED.

WALLER and COBB, P.JJ., CARLSON, DICKINSON and RANDOLPH, JJ., concur. EASLEY, J., dissents with separate written opinion joined in part by GRAVES, J. DIAZ, J., not participating.

EASLEY, JUSTICE, DISSENTING:

I must respectfully dissent with the majority's imposition of a strict compliance standard against Easterling. I would affirm the trial court's denial of UMMC's motion for summary judgment and affirm the ninety day stay in the proceedings. This case is unique because UMMC notified Easterling of its egregious mistake. Therefore, I must disagree with the majority's imposition of a strict compliance standard for the ninety day waiting period for the reasons stated below.

Without dispute, this is a horrible and tragic case. Easterling had to endure the loss of her child; bury a child that was not her own; receive confirmation that UMMC had mistakenly given her the wrong child; and finally have a second burial of her own child. A pivotal distinction in this case is that UMMC notified Easterling that it had mistakenly given her the wrong dead child. By informing Easterling of a mistake of this magnitude, there is no question that UMMC would have and should have been bracing itself for a lawsuit.

Easterling argues that she substantially complied with the notice requirements of the MTCA and relies upon *City of Booneville* and *City of Wiggins*. In *City of Booneville* and *City of Wiggins*, this Court held that the claimants substantially complied with the requirements of MTCA § 11-46-11. In *City of Booneville*, the claimant filed the lawsuit prior to giving notice. *City of Booneville*, 738 So.2d at 1241. Whereas, in *City of Wiggins*, the claimant filed suit sixty-

seven days after giving notice. *City of Wiggins*, 760 So.2d at 695.

The majority, however, relies upon *Davis* and *Wright* to hold that substantial compliance no longer applies to the ninety day notice requirement of the MTCA. However, the facts of this case are clearly distinguishable from *Davis* and *Wright*.

The key fact in this case is that UMMC notified Easterling of its mistake. Therefore, it should have been no surprise to UMMC that Easterling would file suit considering that this mistake concerned the mix-up of the bodies of her dead child and another child. By simply notifying Easterling of the mistake, UMMC must have known that the nature of the mistake would bring litigation. UMMC was in essence placing itself on notice and should have been preparing for a lawsuit.

In *Wright*, this Court affirmed the grant of summary judgment in favor of a doctor and hospital. *Wright*, 876 So.2d at 364. That case concerned a negligence claim for the failure of proper diagnosis and treatment in the death of an eight month unborn child. *Id.* at 364. Wright filed her complaint eleven days after filing her notice of the claim. *Id.* at 366. In *Davis*, the defendants received notice of the claim on the same day that the lawsuit was filed. *Davis*, 869 So.2d at 402.

Both *Wright* and *Davis* concerned allegations of a failure to diagnose the patient. The doctors and hospitals did not notify the claimants of any wrongdoing. Unlike the facts of this case, the medical staff and hospitals did not admit any mistake in *Wright* and *Davis*. Both *Wright* and *Davis* also had underlying one-year statute of limitations problems. Here,

Easterling filed her lawsuit less than one year after her daughter's death. These are key distinctions in these cases. Furthermore, Easterling provided UMMC more notice than the claimants in *Wright* and *Davis*, albeit not ninety days.

The majority cites that Easterling filed her action in September 2002, prior to giving 90 days notice. This is true; however, Easterling never served the complaint prior to giving UMMC notice of her action. In January 2003, Easterling gave notice to UMMC. Thereafter, Easterling served UMMC with the complaint a month later. As stated before, because of UMMC's disclosure of its mistake and the nature of this case, there should have been no question that Easterling would seek to bring an action against UMMC.

I believe that the notice provision is to provide medical personnel and facilities time to prepare for litigation. Here, UMMC notified Easterling of its own wrongdoing which was of such a sensitive nature that there would be no question of impending litigation. Surely, the hospital must have considered litigation and liability issues before informing Easterling of the nature of its mistake. Therefore under the facts of this case, I would affirm the trial court's denial of the motion for summary judgment and affirm the ninety day stay.

GRAVES, J., joins this opinion in part.

APPENDIX C

**IN THE CIRCUIT COURT
OF THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI**

Case No. 251-02-001251-CIV

[Filed November 16, 2004]

ANGELA EASTERLING as Personal Representative of the Wrongful Death Beneficiary of WADREANNA QUADASHSEA MAGEE,	)
Plaintiff,	)
v.	)
UNIVERSITY OF MISSISSIPPI MEDICAL CENTER AND JOHN DOES 1-10,	)
Defendants.	)

ORDER

THIS ACTION came before the Court on motion of defendant University of Mississippi Medical Center, by and through counsel, requesting the trial court to certify its ruling denying defendant's Motion for Summary Judgment on the basis of plaintiff's failure to substantially comply with the

notice of claim requirements under *Miss. Code Ann.* § 1146-11 for interlocutory appeal and the Court, having maturely considered defendant's motion, is of the opinion that defendant's request for certification for interlocutory appeal should not be granted under *Mississippi Rules of Appellate Procedure* 5(a).

IT IS, THEREFORE, HEREBY ORDERED AND ADJUDGED that defendant University of Mississippi Medical Center's motion requesting certification for interlocutory appeal should be and the same hereby is denied.

SO ORDERED this the 10th day of Nov., 2004.

/s/_____
CIRCUIT COURT JUDGE

APPENDIX D

IN THE CIRCUIT COURT
OF THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

Case No. 251-02-001251-CIV

[Filed November 15, 2004]

ANGELA EASTERLING as Personal Representative of the Wrongful Death Beneficiary of WADREANNA QUADASHSEA MAGEE, *Plaintiff,*	)
v.	)
UNIVERSITY OF MISSISSIPPI MEDICAL CENTER AND JOHN DOES 1-10, *Defendants.*	)

ORDER

This cause came on before this Court on Defendants' Motion for Summary Judgment, and after hearing argument of counsel for the parties, and being fully advised in the premises, the Court finds that the Motion should be denied.

IT IS THEREFORE ORDERED that the Defendants' Motion for Summary Judgment is denied.

IT IS FURTHER ORDERED that this case is stayed for the period of 90 days from and after the date of this Order to allow the Defendants to avail themselves of the opportunity to investigate the wrongful death and personal injury claims of the Plaintiff and to negotiate a possible settlement of these claims.

SO ORDERED this 3rd day of Nov., 2004.

/s/
CIRCUIT COURT JUDGE

PRESENTED BY:

/s/
Charles E. Gibson, III
ATTORNEY FOR PLAINTIFF

APPENDIX E

IN THE CIRCUIT COURT
OF THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

Case No. 251-02-001251-CIV

[Filed January 23, 2003]

ANGELA EASTERLING as Personal Representative of the Wrongful Death Beneficiary of WADREANNA QUADASHSEA MAGEE,	)
Plaintiff,	)
v.	)
UNIVERSITY OF MISSISSIPPI MEDICAL CENTER AND JOHN DOES 1-10,	)
Defendants.	)

ORDER FOR ADDITIONAL TIME
TO COMPLETE SERVICE OF PROCESS

The above styled and numbered cause came on to be heard upon PlaintifFs Motion For Extension of Time to Complete Service of Process, and the Court is of the following opinion:

IT IS ORDERED that the Plaintiffs are granted 30 days from the date of this Order in which to serve process upon Defendants.

SO ORDERED this 21st day of January, 2003.

/s/
CIRCUIT COURT JUDGE

APPENDIX F

IN THE CIRCUIT COURT
OF THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

Case No. 251-02-001251-CIV

[Filed January 17, 2003]

ANGELA EASTERLING as Personal Representative of the Wrongful Death Beneficiary of WADREANNA QUADASHSEA MAGEE, *Plaintiff,*	)
v.	)
UNIVERSITY OF MISSISSIPPI MEDICAL CENTER AND JOHN DOES 1-10, *Defendant.*	)

MOTION FOR EXTENSION OF TIME TO COMPLETE SERVICE OF PROCESS

COMES NOW Plaintiff Angela Easterling by and through her attorneys and moves the Court to grant Plaintiff an additional one-hundred twenty (120) days within which to serve Summonses and the Complaint upon Defendants. As

grounds for this Motion, Plaintiffs would show unto the Court the following:

1.

Plaintiff has not served any Defendants in this cause of action, and none will be prejudiced in any way by an extension of time in which to serve them with process.

2.

Plaintiffs' counsel has not served Defendants because the case is not ripe due to the notice required by §11-46-11 of the Mississippi Code of 1972, as amended.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs, through their attorneys, move the Court to allow an additional one-hundred twenty (120) days within which to serve Summonses and the Complaint in this cause upon Defendants herein.

Respectfully submitted this the 17th day of January, 2003.

ANGELA EASTERLING as Personal Representative of the Wrongful Death Beneficiary of WADRENNA QUADASHSEA MAGEE

/s/
Charles E. Gibson, III

APPENDIX G

EMAIL CORRESPONDENCE FROM LAURA HIPP TO TAMMY SMITH

[Dated August 17, 2006]

From: Laura Hipp
Sent: Thursday, August 17, 2006 4:29 PM
To: Tammy Smith
Subject: Story

Friday, April 7, 2006

High court nixes suit on wrong baby.

Woman claims her daughter found in morgue after being given child to bury.

By Jack Elliott Jr.

The Associated Press

The Mississippi Supreme Court has dismissed a Jackson woman's lawsuit against the University of Mississippi Medical Center over claims that the hospital gave her the wrong baby to bury in a grave intended for her daughter.

The issue before the Supreme Court on Thursday had nothing to do with the merits of the lawsuit filed by Angela Easterling in 2004 in Hinds County Circuit Court.

UMC petitioned the Supreme Court to dismiss the lawsuit. The Supreme Court agreed with UMC that Easterling filed a lawsuit before filing a notice of claim. A notice should precede a lawsuit as an attempt to settle a dispute before going to court, the hospital said in a petition to dismiss the lawsuit.

Chief Justice James Smith Jr., writing for the Supreme Court, said the court has strictly enforced the 90-day rule as provided for in the Mississippi Tort Claims Act. The MTCA controls all lawsuits for negligence brought against the state or local governments and public officials.

"This court finds Easterling failed to comply with the 90-day notice requirement when she filed suit on Sept. 19, 2002, almost four months before giving notice," Smith wrote.

Easterling's lawsuit, which gives only one side of the legal argument, alleges that UMC gave her the wrong baby to bury at a July 10, 2002, funeral. She claims she was notified that her daughter was found later in the hospital's morgue.

"This court finds Easterling failed to comply with the 90-day notice requirement."

APPENDIX H

AFFIDAVIT OF ANGELA EASTERLING

STATE OF MISSISSIPPI
COUNTY OF MADISON

AFFIDAVIT

I, Angela Easterling, prior to contacting or seeking legal representation in this matter, met with and talked with representatives from University of Mississippi Medical Center regarding settlement, thereby exhausting all procedures available to me to seek answers to my questions and a remedy to this matter before filing suit.

/s/ _____
ANGELA EASTERLING

SWORN TO AND SUBSCRIBED before me this the 16th day of February, 2005.

/s/ _____
Cherry M. Pittinger
Notary Public